VIRGINIA LAW REGISTER

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Errata.

The Editor-in-Chief laid it on the stenographer, the stenographer lays it on the linotype operator, the linotype operator lays it on the proof reader, but no matter where the axe falls the Editor-in-Chief insists that he wrote "La Salle des Pas *Perdus*" and not "perduos," on page 310 of the August number; and on page 311 he wrote, or dictated "ma" where somebody wrote it "moi," and the subscribers to the REGISTER will confer an everlasting favor upon him if, for the benefit of future ages, they will correct these two apparent errors, and also write *Bazoche* instead of Baroche.

In the address of Judge Burks on the Code of 1919 printed in the June number of the REGISTER, at middle of page 121 it is said "It had been held in *Kain* v. *Ashworth,* 119 Va. 605." This line should have read "It had been held in *Kain* v. *Ashworth* by the Circuit Court of Washington County, and the decision was afterwards affirmed in 119 Va. 605." The change referred to in the paragraph containing this line was made by the revisors in October 1915, and the same or similar change was made by the Legislature afterwards in the Acts of 1916, which latter act is referred to in the opinion of Judge Kelly in 119 Va. 605, 609. The section of the new Code in which the change is made is 6046 and not 6056 as stated in note 30 of the address.

The Strictissimi Juris Rule and Bonding Companies.

It is to be regretted that in the case of *American Surety Company* v. *Quincy,* decided at Wytheville June 12th, 1919, our Supreme Court uses the following language: "The contract of the Surety Company comes clearly within the rule of law which is well stated as follows in the case

of *Mann* v. *Guardian,* 119 Va. 634. 'It is very true that the liability of a surety is always *strictissimi juris* and cannot be extended by construction.' We have no fault to find with the language stated as a general principle applied to the ordinary surety; but as applied to a surety company—one engaged *in the business* of going upon bonds as surety *for hire*—we do not believe it states the law correctly—and it is certainly against the weight of authority and, we respectfully submit, of right reason. As far as the instant case is concerned it is mere *obiter* anyway, as it was not necessary to pass upon that question in the decision of the case. But statements like this are too often quoted as authority and the courts sometimes follow them, because they do not like to go back upon a statement of law even if it is obiter.

Judge Sims reiterates this language in his dissenting opinion in the case if the *National Surety Company, etc.,* v. *Com. ex rel,* etc., also decided at Wytheville the same day, quoting this time *Crane* v. *Buckley,* 203 U. S. 341, and applies the rule to the bond executed in that case, thus showing that in his opinion there was no distinction to be drawn between the voluntary and ordinary surety, who has always been a favorite of the law, and a bonding company which goes into the surety business for the money that is in it and solicits such business.

Now in our humble judgment there is a vast deal of difference between the "accommodation" surety—if we may coin the word—and the surety "for hire." In an editorial in Vol. II N. S. of the REGISTER, p. 298—Aug. 1916—we attempted to show that the *strictissimi Juris* rule did not apply to surety companies. The Supreme Court of the United States in *U. S. F. & G. Company* v. *U. S.,* 191 U. S. 415, expressly holds that the rule does not apply and ought not to apply to bonding companies.

We refer those interested in the subject to the aforementioned editorial in which we showed that Connecticut, Minnesota, Pennsylvania, Missouri, Iowa and New York had agreed with the Supreme Court of the United States. In the case of *Rule* v. *Anderson,* 160 Mo. App. 347, the reason for not applying the rule is so well laid down that we repeat it:

"The special solicitude of the law for the welfare to voluntary parties who bind themselves from purely interested motives never comprehended the protection of big enterprises organized for the express purpose of engaging in the business of suretyship for profit. To allow such companies to collect and retain premiums for their services created according to the nature and extent of the risk, and then to repudiate their obligations on slight pretexts that have no relation to the risk, would be unjust and immoral, and would be a perversion of the wise and just rules designed for the protection of voluntary sureties. The contracts of surety companies are contracts of indemnity and as such fall under the rules of construction applicable to contracts of insurance. Since they are prepared by the companies and generally bound with conditions and stipulations devised for the restriction of the obligation assumed by the Company, such stipulations must not be extended to favor limitations providing for forfeiture of the contract. They must be strictly construed and no unreasonable right of forfeiture should be allowed." See also Pingrey on Suretyship and Guarantee, 2nd Edition, page 442.

In view of these decisions and as the exact point will doubtless come up at some future time before our own Supreme Court, it is to be sincerely hoped that the language used in the opinion of the Court in the *American Surety Company* v. *Quincey, Supra,* will be remembered to be only *obiter dicta* and not a precedent.

The Honor of the Bar —Belgian Lawyers.

The duties, the responsibilities, the privileges of advocates are too well known to need discussion, but one feels a thrill of pride when one reads in Brand Whitlock's admirable book on Belgium the magnificent stand which the Belgian lawyers took in their controversy with the hounds—we beg the dogs' pardon, we mean Huns—in the German occupation of Brussels.

A German firm had been sued in the Belgian courts and no Belgian lawyer being willing to represent it, the President of the Bar Association, called the Bâtonnier, designated a Belgian lawyer to appear and undertake the defence. The cause was

heard by the judges and the judgment rendered against the German firm, which thereupon appealed, not to the higher courts but to the German authorities, and one of these authorities wrote to the Bâtonnier, a gentleman named Théodor complaining that the lawyer assigned to represent the German firm had not done his duty. We copy a portion of his reply:

"It is not for me, as Bâtonnier, to concern myself with the state of mind of my colleagues, especially so far as their relations with the Germans are concerned. Their conscience belongs to them, with its secrets, its sympathies or its antipathies, without the right on the part of any one, man or power, to penetrate it.

"But what I can affirm is that the lawyer, worthy of the name, who has agreed to defend the interests of a German subject before the law, whether he do so spontaneously or whether he be entrusted with that duty by the Bâtonnier of the Order, will consider it a duty and an honor to omit nothing, and to do everything for the triumph of his cause.

"In the exercise of his duties the lawyer is influenced neither by frailties nor by malice; for him there is neither friend nor enemy. His regard for his professional ability is not given over to the hazard of circumstances. The very war itself in which we are engaged could not impair his spirit of loyalty and of elementary justice.

"Undoubtedly since she has invaded our soil Germany has become our enemy. Threatened by her in our national existence, we combat her with all the bitterness of a deeply rooted patriotism. To her we owe nothing. On the other hand, the German, subject to the laws, amenable to our courts, is sacred in our eyes. Should he appear before our courts, civil or criminal, let him be reassured: He will know neither denial of justice, nor partiality, nor ill-will, nor vexations That if his liberty, his honor or his interests were unjustly threatened the bar would be there to protect him.

"As for the threat which is made against us—"to take measures"—measures of which I can imagine neither the nature nor the extent—it is superfluous. It could not modify our attitude in the least. We shall act in the future as we have done in the past, with no sort of preoccupation and no other motive than that of doing right.

"It will be the eternal honor of the Belgian Bar, and its reasons for existing, to obey in the exercise of its high mission, only its conscience, to speak and act without hatred

and without fear, to remain, whatever befall, without fear and without reproach.

"May it be permitted to me to add that the bar is not an administrative body. It is an autonomous and a free organization. Placed by law at the side of the Magistracy to accomplish with it the joint task of justice, protected by its secular traditions, it knows neither the guardianship nor the control of any political power. It regulates its life and its activity as it wishes. It receives orders or injunctions from no one.

"It exercises this liberty without restraint, not in the interest of its members, but in the interest of its mission. It has developed in its heart more discipline than pride; it has created a code of severe rules of honor and of conduct which only the chosen can endure."

The bar in Belgium is very closely organized. "L'Ordre des Avocats" is a much more important corporation than our Bar Association. It is an organization exclusive, proud and jealous of its privileges and prerogatives. It disciplines its own members, lays down the rules for their conduct and officially prescribes the ethics of the profession and the rules for admission to the bar. It elects each year a presiding officer called the "Bâtonnier," who exercises far more authority than the President of any Bar association in the world.

The civilized world owes to Belgium a debt it never can pay in that its gallant resistance checked the march of the German Army to Paris and saved the world from the hellishness of German rule. The profession at large owes it another debt of gratitude for this superb conduct of its lawyers and the noble vindication of their rights by their head.

The Fourteenth Amendment Once Again. Employers' Liability: Rights of the States.

As we have had occasion to note once or twice before, Mr. Justice McReynolds doesn't propose to have Mr. Justice Holmes monopolize all the resplendent phraseology of the English language. He meets the latter's definition of what the Fourteenth Amendment is not (as alluded to in our editorial on page 315) with

language equally as fine. "Of course," he says in his dissenting opinion in *Arizona Copper Co.* v. *Hammer,* decided June 19th, 1919, "the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled."

But this language is not the only remarkable language in this rather remarkable case—remarkable not only for its far-reaching import, but remarkable in that four of the justices—the Chief Justice, J. J. McKenna, Van DeVenter, and McReynolds —dissent, while Justice Day does not appear to have taken any part in the decision his name not appearing as concurring or dissenting. Justice McKenna delivers a separate dissenting opinion. Pitney, J., delivers the opinion of the Court, and Holmes, J., delivers a concurring opinion with the reasoning of which J. J. Brandeis and Clarke concur. So the case is decided by a divided Court and therefore it may not be considered as binding authority, Mr. Justice McKenna's language to the contrary notwithstanding. For in the opening sentence of that Justice's dissenting opinion he seems to fear it may become a rule of decision forever and the gravity of the decision is stated by him in no uncertain language. He says:

> "I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever—indeed, may even be extended. It is said to rest on the cases sustaining the Workmen's Compensation Law of New York (243 U. S. 203, 61 L. ed. 675, L. R. A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943), and its associate cases in the same volume, upholding like laws of other states. The present case certainly comes after those cases, and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is not a step from the deck to the sea—the metaphor suggests a peril in the consequences."

And Mr. Justice McReynolds in concluding his dissenting opinion says:

"I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable and oppressive on both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced."

And the strange part of the decision to us is that the Justices upholding the law in question decide it upon a question of states' rights, holding that the states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment to the Federal Constitution and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

The case in brief is this:

Article 18 of the Constitution of Arizona contains, amongst others the following sections:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, the Legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation, shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been killed or injured.

"Section 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by

> which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any law affecting such employment; provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to Section 7 an Employers' Liability Law was enacted and pursuant to Section 8 a Workman's Compulsory Compensation Law was enacted. Both laws were sustained by the lower courts—the former by the State Supreme Court; the latter by the United States District Court. The Supreme Court of the United States sustained all of the decisions and has thus established the precedent that an employee may recover from his employer for an injury incurred in his employment, the employer being without fault, and that the employer is liable for damages for the death of the employee incurred in his service, although the employer is absolutely without fault. Here indeed is a penalty put upon production that must well bid us pause and carefully consider the serious effects. Any laborer on a farm who falls off of a loaded wagon carrying the farm products can recover damages from his employer, although the employer was in no degree responsible for the fall. Any railroad employee who fell off a train and broke his arm could recover from the Company such an amount as a jury saw fit to give him, although the Company was in no way responsible. Well may Justice McKenna say there is "menace in the present judgment to all rights subjecting them unreservedly to conceptions of public policy."

It is true the Arizona Acts confine their operations to hazardous occupations, but as Justice McKenna points out that under the New York Compensation Law, approved in 243 U. S. p. 203, there are forty-two groups of hazardous occupations and there is nothing which, under the present decision can prevent

a State from applying the same rule to a non-hazardous occupation. We cannot further forbear, in view of the alarming aspect of present conditions between capital and labor in some of its forum, to quote further from Justice McKenna's dissenting opinion:

> "We know things are in change—have changed—and a mark of it that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee, and to give to the latter a particular distinction—relieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and, therefore, as a consequence, that where he has liberty of action, he has responsibility for action. In a word the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences—gives it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it may be, the judgment now delivered will be cited to justify it. Will it not be said that if one right of an employer can be made to give way, why not another?—made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another?"

And the—we were about to say "amusing," but change the word to "amazing" part of the whole business is that this decision is based upon the "rights of the states." What a will-o-the-wisp, what an illusive, shadowy thing these rights have become, as we see how they are twisted, converted, subverted, to fit any condition the courts desire to apply them to and how relentlessly they are trodden under foot when they stand in the way of the centralization of this Government.

He who out of the conflicting and contradictory decisions of

the Supreme Court can determine what the rights of the States are, should take his place with Aedipus, or with him who threaded the labyrinth of the Minotaur. Truly he would be a very Daniel.

Our Duty to Lawyers Who Have Been Soldiers in the Great War.

Lucien H. Cocke, Esq., the late President of the Virginia State Bar Association, has received the following letter from the War Department, to which we call the earnest attention of the members of the Bar.

1118 Council of National Defense Bldg.

WAR DEPARTMENT,
WASHINGTON.

OFFICE OF THE ASSISTANT TO THE SECRETARY

July 25, 1919.

Mr. Lucian H. Cocke, President,
Virginia State Bar Association,
Roanoke, Virginia.

My dear Mr. Cocke:—

The division of my office which deals with the placing of discharged officers in civilian life, has on its lists quite a few lawyers. These men, returning from overseas on going back to their old practice, find that their former clients have gone to other men, in many cases their partnership has been dissolved, and the cost of living in all that it comprises has gone up so that they are in a very difficult situation.

If this matter were brought to the attention of the members of your Association, some of them might have or know of positions for which these men could qualify.

In order that there may be no waste of time by the wrong man being referred to the wrong position, we should appreciate very much having the full requirements necessary for any opening that there may be, so that we may choose a man with similar qualifications and refer him to the opportunity.

Thanking you very much for anything you may be able to do or suggest in helping us place these discharged officers, I remain,

Very truly yours

ARTHUR WOODS,
Assistant to the Secretary.
BY E. S. GARDNER.

Just exactly how we can extend aid to our brethren who may be in the position set out in this letter is rather difficult to determine, but certainly the matter deserves our careful consideration. We would suggest, therefore, that any member of the Bar knowing of a place which one of these lawyers might fill, should at once communicate with the Secretary of War, directing his letter to the address given above. We sincerely hope that this may not be read and passed over as a matter of small moment, but that we shall not only promptly communicate with the Department in case we know of a place which such lawyers might fill, but shall make inquiries and do all in our power to find a place for these men who have sacrificed their living for our liberties and the liberties of the world.

Proof of Venue.

We think that the State is to be congratulated upon the decision of our Supreme Court of Appeals in the case of *Russell* v. *Commonwealth,* handed down at Wytheville, June 12th, 1919. We have no doubt that very many practitioners have often seen a verdict for the Commonwealth reversed on the ground that the venue as laid in the indictment is not proved, although every person, from the judge on the bench, down to the most unintelligent party in the courthouse was thoroughly aware at what place the crime was committed. As our Court of Appeals has said in the Powers case, 124 Va. 17: "The failure clearly to prove venue is usually due to inadvertence flowing naturally from the familiarity of court, counsel, witnesses and juries with the locality of the crime, and appellate court will generally and properly lay hold of and accept as sufficient any evidence in the case, direct or otherwise, from which the fact may be gathered."

In the present case the indictment charged the crime of larceny to have been committed in Petersburg but there was no direct proof that the crime was committed in Petersburg, but as the court says, the indictment charged the property was stolen in the city of Petersburg, the case was tried at Petersburg, and the witness, Worrel, testified he was employed as a detective with the local police force, that he went with another police officer to investigate the case, found the stolen property at the

prisoner's home, went to the home of Mrs. Robertson and brought her to the prisoner's home to identify the property. Mr. Robertson's wife testified the property was stolen from the home on Sycamore Street. The court very properly, we think, says that this is sufficient to show that the crime was committed in Petersburg.

The statement of this case brings very sharply to the mind of the Editor-in-Chief his second criminal case, in which he appeared for the son of an old family servant. The boy was indicted for breaking open a cornhouse and stealing corn. The breaking and larceny were established without question and there was no doubt of the prisoner's guilt, but the learned Commonwealth's Attorney—and he was a very learned one—failed to prove the crime was committed in Albemarle County, and on motion for a new trial the verdict was set aside. The verdict was for one year in the penitentiary. On the second trial the unfortunate darkey received two and served out his term. Our Editor-in-Chief, who was a very young man, just a little over twenty-one, was terribly chagrined, but his old law professor, Stephen O. Southall, learning of the case met him and said, "Do not be downhearted. I was once employed to defend a white man who, in connection with a negro, had committed a burglary. The negro had no counsel and was convicted at the first calling of the case and given one year in the penitentiary. I obtained several continuances for my client and his co-criminal had served out his term in the penitentiary and was sitting in the gallery when he heard his fellow criminal sentenced to five years in the penitentiary for the crime, which they had committed together."

Right to Try the Kaiser.

Our esteemed contemporary, Mr. Chas. E. George, Editor of the Lawyer and Banker, continues to differ from us as to the right of the Allies to extradite and try the former German Kaiser. He emphatically reiterates that no such right exists. In the July-August number of his worthy Magazine he has the following to say:

"Hon. R. T. W. Duke, Jr., editor of the VIRGINIA LAW REGISTER, a brilliant writer and sound lawyer, joins in the opinion of his associate, Beirne Stedman, that the ex-Kaiser can be extradited from Holland and tried on complaint of the Allies for 'a supreme offense against international morality and the sanctity of treaties.'

"The VIRGINIA LAW REGISTER is generally highly esteemed. Its editors are high ranking lawyers. Such being the case we confess we cannot see how both these gentlemen have fallen so far wrong in their expressed legal conclusions.

"The so-called indictment claimed by the Peace Conference against William Hohenzollern was and is a gigantic bluff. Despite high-sounding imitation college professor phrases, no crime as the case stands,—no specific acts against life or destruction of property has been made. We are surprised that as good lawyers as our colleagues, should have been misled with this clap-trap demand for justice, absolutely lacking in requisite legality, a charge of general accusation of responsibility without one specific criminal act noted.

"The Allied conference has shied at charging the ex-Kaiser with ordinary crimes for the simple reason that England, Italy, Belgium, Holland and various other European nations "in good standing" still have kings and queens with whom waging war is more or less a royal prerogative, and who wish to be immune from the danger of being charged with crime.

"But there is no such thing as an offense against international morality. Who ever heard of it? What is international morality like? And is the sanctity of treaties a matter of religion or of ribbons attached to a treaty? An offense against international morality is utterly meaningless if it cannot be defined in terms of acts of robbery, killing, abducting and the like. It is precisely the long catalogue of acts of this sort which is the basis of the international allied demand on Germany for reparation.

"That demand is utterly inconsistent, illegal and impossible, if there were no persons in authority who could and did command an organized Germany to go to war. Lacking such responsible leadership, Germany would have been in the position of an insane mob which could be treated by the Allies only on the high ground of compassion. Germany should be indicted for 'the supreme offense against good sense and the sanctity of life in general,' and should be let off with that if the ex-Kaiser is to be let off with the only indictment the Peace Conference has thus far found against him.

"There is a strong suspicion that Lloyd-George's announcement of the coming trial of the former German emperor in London is all bluff, in keeping with the conference indictment-in-general, for the Allied delegates generally have no knowledge of such a plan; the 'big four' have announced nothing of the sort; they have made no criminal indictment of the arch-villain of history; and Lloyd-George is probably convinced that Holland will not be coerced into giving up the criminal when the Allies 'request' it."

The arguments presented by us in a former editorial (April Number, IV V. L. R., N. S., 937) will not be added to, for while they are not by any means all that can be offered on the subject they are conclusive enough for our purpose, the Editor of the Lawyer and Banker to the contrary notwithstanding.

While we are surprised that one of Mr. George's well known ability as a lawyer and writer should reach such a conclusion respecting the subject, and are sorry that he sees fit to differ with us, still we feel some little compliment in the fact, for it is more honor to have one of his caliber criticise one's views on a subject than to have some of lesser weight support them.

Mr. George is a second cousin of England's great Prime Minister, and with all due respect, we must in this special instance, give more weight to what his relative thinks on the subject. Lloyd-George backs us up, and it is history that he generally supports what is right.

It must not be implied that Mr. George in any manner desires to defend the ex-Kaiser. Far from it. He is a simon-pure American and expresses his 100% Americanism both in word and in deed.

And now for a personal word. Pleasant memories are our richest possessions and the Associate Editor is indebted to Mr. George for the happy recollections he has of the few weeks spent in his society a little over a year ago while both were sojourning at one of America's greatest health resorts. His charming personality and the spirit of good cheer which radiated from his kindly soul did much to alleviate the loneliness which a Virginian must always feel when far away from home.